Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

RONALD BRADLEY,
Petitioner,

v.

MONARCH CONSTRUCTION, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

On Brief

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Question Presented

Did the Petitioner offer sufficient evidence of the Respondent's status as an employer, as defined in the American's With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, and the Nebraska Fair Employment Practices Act, NEB. REV. STAT. §§ 48-1101 *et seq.*, to survive the Respondent's motion for judgment as a matter of law?

Parties To The Proceedings

The caption of this Petition fully identifies all parties to this appeal.

Table of Contents

Question Presented i

Parties To The Proceedings ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutes and Rules Involved 1

Statement of the Case 2

Basis For Federal Jurisdiction 4

The Trial 4

The Judgment of the District Court 7

The Appeal 8

Reasons For Granting The Writ 8

Statutes:

American's With Disabilities Act,
42 U.S.C. §§ 12101 *et seq.* . . . . . i, 2, 4-5, 11

Nebraska Fair Employment Practices Act,
NEB. REV. STAT. §§ 48-1101 *et seq.* . . . . . i, 3-5

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1367(a) 5

Rules:

FED. R. CIV. P. 50 10

FED. R. CIV. P. 50, Advisory Committee Note to
Subdivision (a) (1991) 3, 8, 15

The Petitioner, Ronald Bradley, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the Order of the United States District Court of the District of Nebraska granting the motion of the Respondent, Monarch Construction, Inc., for judgment as a matter of law.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is reproduced in Appendix A. The memorandum and order of the United States District Court for the District of Nebraska is unreported and is reproduced in Appendix B. The dismissal and notice of rights letter from the United States Equal Employment Opportunity Commission is reproduced in Appendix C. The order of the Circuit Court denying Petitioner's motions for rehearing and rehearing *en banc* is unreported and is reproduced in Appendix D.

Jurisdiction

The opinion of the United States Court of Appeals for the Eighth Circuit was issued May 23, 2002. On June 26, 2002, the Circuit Court entered its denial of Petitioner's timely motions for rehearing and rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Rules Involved

42 U.S.C. § 12111(5)(A):

> The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in

> each of 20 or more calendar weeks in the current or preceding calendar year[.]

NEB. REV. STAT. §§ 48-1102(2):

> Employer shall mean a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]

FED. R. CIV. P. 50(a):

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Statement of the Case

In 1988, Petitioner Ronald Bradley began working for Respondent Monarch Construction, Inc. as a carpenter. Over time, Monarch's owners, David and Sherri Boyd, came to rely upon Mr. Bradley's experience and professionalism, and they promoted him to the position of Carpenter Supervisor. Monarch provided him with a pick-up truck so that he could travel to the various home construction work sites to supervise the work of the other Monarch employees, and of the subcontractors. For nine years, Mr. Bradley performed his

duties for Monarch with devotion and loyalty. His employers would later admit that they had no complaints about Mr. Bradley's work for them.

In September of 1997, Mr. Bradley injured his back while doing work for his employer. Lifting freight pallets at a work site, he turned, and felt a sudden tremendous pain shoot through his back and legs. He had suffered a herniated intervertebral disc. In September of 1998, Mr. Bradley submitted to a lumbar discectomy surgery to treat his injury.

Mr. Bradley enjoyed his job with Monarch and looked forward to his return. Following his surgery, he began to feel well enough to return to work. In November of 1998, Mr. Bradley entered the offices of Monarch Construction and spoke with Mr. Boyd about resuming his duties as Carpenter Supervisor. Without any provocation from his former employee, Mr. Boyd responded with profane and aggressive language, telling Mr. Bradley that he could not return to work for Monarch Construction, and ordering him to leave the premises.

Mr. Bradley clearly understood that he had been fired. While he had not heard directly from his employers in the fourteen months since his injury, he knew that they were being notified of events in his workers' compensation claim, and therefore had knowledge of his medical condition. Mr. Bradley decided to pursue his rights under the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, as well as the Nebraska Fair Employment Practices Act, NEB. REV. STAT. §§ 48-1101 *et seq.*

Basis For Federal Jurisdiction

Mr. Bradley began his search for a remedy by making a complaint with the Nebraska Equal Opportunity Commission and the United States Equal Employment Opportunity Commission. Following the dismissal of his administrative claims on February 17, 2000, Mr. Bradley filed suit in the United States District Court for the District of Nebraska on May 2, 2000.

The District Court derived its subject matter jurisdiction of Mr. Bradley's ADA claim from 28 U.S.C. § 1331. Further, the District Court maintained supplemental jurisdiction of Mr. Bradley's state law claim by virtue of 28 U.S.C. § 1367(a).

The Trial

On August 29, 2001, the parties appeared before the Honorable Judge Robert W. Pratt, visiting judge from the Southern District of Iowa, to begin a jury trial on Mr. Bradley's ADA and state law claims against Monarch. Through his counsel, Mr. Bradley set about offering evidence and eliciting testimony to prove the elements of his case. Pertinent to this appeal, Mr. Bradley provided facts showing that Monarch is an employer as defined in both the ADA and the NFEPA.[1] Specifically, he testified that as the Carpenter

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[1] The Americans With Disabilities Act, at 42 U.S.C. § 12111(5)(A), and the Nebraska Fair Employment Practices Act, at NEB. REV. STAT. § 48-1102(2), apply substantially identical definitions to the term "employer" as used in the statutes. Nebraska courts have recognized this commonality to the point of relying upon federal case law regarding the ADA definition to interpret the definition of "employer" under the NFEPA. See *City*

Supervisor, charged with managing and allocating the Monarch workforce, he was in a unique position to know the identities and dates of employment of persons that Monarch employed.

The following summarizes the substance of Mr. Bradley's testimony on this point, identifying the employee, and the period of his or her employment relationship with Monarch during 1997, the calendar year just prior to the year Monarch fired Mr. Bradley:

1. Nick Asta, from the beginning of the year through mid-December, 1997;

2. Ivan Bradley, from the beginning of the year until sometime in September, 1997;

3. Chris Wildrick, the entire year;

4. Ronald Bradley, the Petitioner himself, the entire year;

5. Lynn Gustafson, the entire year;

6. Korey Ulrich, the entire year;

7. Clint Boyd, the entire year;

8. Jon Bruning, the entire year;

9. Judy Shepherd, the entire year;

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of Fort Calhoun v. Collins, 500 N.W.2d 822 (Neb. 1993); *Bluffs Vision Clinic, P.C. v. Krzyzanowski*, 543 N.W.2d 761 (Neb. Ct. App. 1996).

10. Michael Ruddy, from the beginning of the year until sometime in May, 1997;

11. Robert Aspar, the entire year;

12. David Boyd, the entire year;

13. Sherri Boyd, the entire year;

14. Clayton Boyd, the entire year;

15. David Davis, from the beginning of the year until sometime in June, 1997.

After identifying these fifteen Monarch Construction employees, Mr Bradley supported his oral testimony with the introduction of wage reports submitted by Monarch to the State of Nebraska in compliance with state unemployment insurance regulations. Reports submitted for the first three quarters of 1997 list eighteen, nineteen, and eighteen employees, respectively. This documentary evidence is especially compelling considering Mrs. Boyd's later admission that she under-reported numbers of employees on wage reports submitted to the state. Neither party submitted payroll records for the year 1997.

Mr. Bradley then offered evidence regarding an entity known as Monarch Homes Real Estate, a business formed by Mr. and Mrs. Boyd to sell the homes built by Monarch Construction, Inc. He testified that the salespersons for Monarch Homes worked out of the very offices that headquartered the Monarch Construction operations. The real estate sales activities used the same office equipment and restrooms as the home construction operation. He testified that both Mr. and Mrs. Boyd instructed the salespersons in

their sales activities. Mr. Bradley identified Mr. Rod Sigel, a salesperson who was instructed to mow the grass on the office property. Throughout 1997, four salespersons sold homes built by Monarch Construction.

The Judgment of the District Court

At the close of Mr. Bradley's case, Monarch moved for judgment as a matter of law pursuant to Fed. R Civ. P. 50(a). The Court took the motion under advisement at that time. However, at the close of all evidence, the Court granted Monarch's renewed motion.

In its memorandum opinion, the District Court first noted a split among the United States Courts of Appeal as to whether or not the determination of an ADA defendant is an "employer" is question of jurisdiction. However, the Court then proceeded to couch its opinion in the language and reasoning of a FED. R. CIV. P. 50(a) analysis, without any further consideration or determination of the jurisdictional question.

The District Court found that, as a matter of law, Mr. Bradley had "failed to present sufficient evidence on which *either the court or the jury* could reasonably find, without pure speculation, that [Monarch] had the requisite number of employees to qualify as an 'employer'[.]" [Emphasis added.] In its Judgment, filed concurrently with the Memorandum and Order, the Court granted Monarch's motion for judgment as a matter of law, and dismissed Mr. Bradley's complaint for lack of subject matter jurisdiction.

The Appeal

Following the dismissal of his case, Mr. Bradley timely filed his Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. In written argument to that Court, Mr. Bradley complained that the District Court had erred in its dismissal of his civil rights case.

The Circuit Court affirmed the District Court's grant of judgment as a matter of law in an unpublished opinion. The opinion did not address the District Court's implicit finding that it could itself determine—as an issue of subject matter jurisdiction—the question of Monarch's status as an employer, without deference to the fact finding role of the jury.

Reasons For Granting The Writ

I.

IN AFFIRMING THE TRIAL COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SANCTIONED A DEPARTURE FAR FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, AND DECIDED AN IMPORTANT QUESTION DIFFERENT FROM THE PRIOR DECISIONS OF THIS COURT.

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." With this statement in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959), this Court once again proclaimed the critical role of a jury of citizens in the operation of our judicial system. The guarantee of the Seventh Amendment to the

United States Constitution, that "the right of trial by jury shall be preserved," has remained vibrant and operative through the diligent stewardship of this Court.

Certainly, the right to a jury trial must be weighed against the demands of judicial economy, as well as the court's due process obligation to insure the proper application of the controlling law. See U.S. CONST. amend V; FED. R. CIV. P. 50, Advisory Committee Note to Subdivision (a) (1991). Rule 50 of the Federal Rules of Civil Procedure is just one sanctioned authority that allows the federal courts to preserve these interests by authorizing judges to dispose of actions that have not raised the need of the jury's fact-finding role. But even this power is limited by the language of the provision:

> If during a trial by jury a party has been fully heard on an issue *and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue*, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FED. R. CIV. P. 50. [Emphasis added.] As codified, the Rule protects a party's right to a jury trial by ensuring that the Rule may not be invoked where the party has offered enough evidence for a jury—applying a reasonable interpretation of the facts before it—to determine a dispositive issue in that party's favor. Courts following the usual course of judicial proceedings have recognized and applied this protective standard; a failure to allow a party his Seventh

Amendment right, even though he has presented evidence that reasonably supports his *prima facie* case, departs from the usual course.

The prior decisions of this Court have more fully articulated the demand for careful application of Rule 50. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), this Court held that a motion for directed verdict may only be granted when "there can be but one reasonable conclusion as to the verdict. [Citation omitted.] If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. [Citation omitted.]"

Later, in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), this Court further clarified the standard for denying access to a jury in stating that a trial court may not weigh the evidence offered by the resisting party, and it must resolve all factual inferences in favor of that party.

Under the circumstances of the trial, below, the District Court's decision to grant judgment as a matter of law ignored both the usual course of judicial proceedings and this Court's prior decisions. As is clear from the record, Mr. Bradley presented ample evidence to support his contention that Monarch is an employer as defined in the statutes.

In *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207, (1997) this Court held that the central inquiry in determining if a purported employer "has" (as that term is used in the ADA, 42 U.S.C. § 12111(5)(A)) an employee, is whether or not the employer "maintains an employment relationship with that individual." With the *Walters* decision, this Court adopted the "payroll method" as a probative test of the employment relationship, noting that

payroll records most readily, but not exclusively, identify such relationships. *Id.* at 206.

Importantly, however, the *Walters* opinion expressly declined to hold that counting names from a payroll record is the only possible consideration determining numbers of employment relationships. This Court held that while a test of an employment relationship looks "first and primarily" at the payroll records, *Id.* at 211, the "ultimate touchstone" is the actual existence of an employment relationship, *Id.* at 212. The opinion cites as an example a situation where a person's name appears on a payroll record, but a closer examination under traditional agency law reveals that the person is not, in fact, an employee. *Id.* at 211.

In the case at hand, neither party introduced payroll records. However, Mr. Bradley testified that in his position as Monarch's Carpenter Supervisor, he himself had personal knowledge of Monarch's employment relationship with fifteen employees during the relevant period.[2]

Mr. Bradley also introduced certain unemployment insurance filings prepared by Monarch for the period. These records bolster and lend credence to the testimony of Mr. Bradley, and were introduced for that purpose.

Inexplicably, the District Court wholly ignored Mr. Bradley's testimony concerning his personal knowledge of

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[2] At trial, Mr. Bradley sought to prove that Monarch had fifteen or more employees in the first twenty weeks of the year 1997, the year just prior to the year of the discriminatory act. Monarch's definitional objections complain only of Mr. Bradley's allegation as to numbers of employees, not the target time period.

Monarch's employment relationships in its memorandum opinion. Rather, the Court referenced the unemployment insurance records, then concluded that this evidence does not create a submissible issue of fact. There can be no clearer demonstration of a trial court's failure to give the non-moving party benefit of all reasonable inferences, than a situation where such a court has simply ignored evidence lawfully admitted at trial.

The Circuit Court did recognize that Mr. Bradley had identified the fifteen employees. But it noted that neither party offered payroll records for the period. It then stated, "Applying the 'payroll method' for determining this issue adopted by the Supreme Court *Walters v. Metropolitan Educational Enterprises, Inc.*, [citation omitted], the district court concluded that Bradley had failed to prove Monarch had fifteen or more employees for each working day in twenty or more weeks in 1997."

The Circuit Court's stated reasoning in support of the District Court's judgment is flawed in two considerable ways. First, the opinion misunderstands the central holding of *Walters*, that the employment relationship governs the application of the employer definition, not the presence of payroll records. Second, Circuit Court seems to disregard the restrictive language of Rule 50—as well as this Court's long-standing jurisprudence—by implying that a party must prove a dispositive issue in order to survive a motion for judgment as a matter of law.

To more completely offer the jury all evidence available to demonstrate that Monarch qualified as an employer, Mr. Bradley asserted that four persons working for an affiliated entity, Monarch Homes Real Estate, Inc., should be counted as employees. His contention is based upon the

holding of the Eight Circuit in *Artis v. Francis Howell North Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1185 (1998), that for purposes of meeting the numerosity requirement, separate entities may be consolidated under certain circumstances. Specifically, *Artis* holds that four factors govern consolidation: 1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. *Id.*

The testimony of Mr. Bradley as well as Mr. and Mrs. Boyd reveals that Monarch Homes operates out of the same building as the construction business, selling only the homes built by the construction business, using the same supplies, equipment and restrooms as the construction business; that both of the Boyds directed the operation of the Monarch Homes workers; and that Monarch Homes was a business formed and owned by the Boyds, the two owners of the construction operation. But somehow, in the face of this testimony, the District Court ruled, and the Circuit Court agreed, that Mr. Bradley had failed to offer sufficient evidence support a reasonable conclusion that the two operations should be consolidated for employee counting purposes.

The District Court then stated that Monarch offered "uncontradicted evidence" that the persons who worked for Monarch Homes were independent contractors. This statement is simply not supported by entire volume of evidence. While the Boyds did testify that they considered their salespersons independent contractors, these conclusions are not uncontradicted in the record. Again referring to the testimony of Mr. Bradley, the evidence reveals that these workers used the instrumentalities and tools of Monarch Homes. They worked out of the Monarch offices. One of the salespersons had worked for the Boyds since the 1970's.

The Boyds called upon another salesperson to mow the grass outside the office. The work of these persons, selling homes built by the construction outfit, was the regular business of Monarch Homes.

In the *Walters* case, this Court made a specific acknowledgment that "traditional principals of agency law" should govern the inclusion or exclusion of persons in the numerosity analysis. *Id.* at 211. There, the opinion cites *Nationwide Mutual Insurance Co., v. Darden*, 503 U.S. 318, 323-324 (1992), where this Court stated a set of criteria for determining the existence of an employment relationship. Mr. Bradley's testimony reveals that the Boyds' assertion of a contractor relationship is contradicted in no fewer than seven of these criteria.

Conclusion

When the Circuit Court affirmed the judgment of the District Court, it sanctioned a major departure from the usual course of judicial proceedings. It allowed the District Court to apply an inappropriate burden to Mr. Bradley's resistance of a motion for judgment as a matter of law, and to disregard controlling case law regarding the payroll method of employee counting, the single entity rule, and common principles of agency law.

Further, the Circuit Court decided important questions of law different from the prior decisions of this Court. Specifically, the Circuit Court strayed from this Court's jurisprudence regarding the Seventh Amendment protections within the language of FED. R. CIV. P. 50(a), and the primacy of the employment relationship concept central to the ADA definition of employer.

For these reasons, this Court should grant a Writ of Certiorari to review the erroneous holdings of the lower courts, and avoid a reemergence of conflict among the Circuit Courts of Appeal.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3319

[Filed May 23, 2002]

Ronald Bradley, Plaintiff-Appellant,	)
v.	)
Monarch Construction, Inc. Defendant-Appellee.	)

Appeal from the United States District Court
for the District of Nebraska

JUDGES:
Before WOLLMAN, BEAM and LOKEN, Circuit Judges.

OPINION

PER CURIAM.

Ronald Bradley hurt his back while employed as a Carpenter Supervisor by Monarch Construction, Inc., and underwent corrective surgery in September 1998. When he returned to work in November, Monarch advised that he no

longer had a job. Bradley commenced this action, alleging that he was discharged in violation of the Americans with Disabilities Act, 42 U.S.C. § § 12101 *et seq.*, and the Nebraska Fair Employment Practices Act, Neb. Rev. Stat. § § 48-1101 *et seq.* At the close of the evidence at trial, the district court[1] granted judgment as a matter of law in favor of Monarch, concluding that Bradley had failed to prove Monarch was a covered employer within the meaning of those statutes. Bradley appeals. We affirm.

The ADA and the NFEPA define "employer" to mean a person engaged in an industry "who has [fifteen] or more employees for each working day in each of [twenty] or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A); Neb. Rev. Stat. § 48-1102(2). Monarch is in the business of building homes, relying extensively on subcontractors for construction work. At trial, Bradley identified more than fifteen employees that he recalled working for Monarch during all or a substantial portion of 1997, the relevant calendar year for purposes of this appeal. However, neither party offered Monarch's payroll records for 1997, and the quarterly reports Bradley put into evidence did not show how many days each employee worked during a particular quarter. Applying the "payroll method" for determining this issue adopted by the Supreme Court in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 136 L. Ed. 2d 644, 117 S. Ct. 660 (1997), the district court concluded that Bradley had failed to prove Monarch had fifteen or more employees for each working day

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[1] The HONORABLE ROBERT W. PRATT, United States District Judge for the Southern District of Iowa, sitting by designation.

in twenty or more weeks in 1997. Bradley further testified that four persons sold homes in 1997 for Monarch Homes Real Estate, Inc., a related company, and argued they should be included in calculating Monarch's work force for purposes of the ADA and the NFEPA. Applying the "single employer" test adopted by this court in *Artis v. Francis Howell North Band Booster Association*, 161 F.3d 1178, 1184 (8th Cir. 1998), the district court concluded that Bradley had not presented sufficient evidence of interrelated operations to permit a reasonable fact-finder to find the Monarch companies were a single employer, and further concluded that the Monarch Homes sales persons were independent contractors.

After careful review of the record, we conclude that the district court correctly applied *Walters* and *Artis* in granting judgment as a matter of law in favor of Monarch on the evidence presented at trial in this case. We further conclude that a more lengthy opinion would have no precedential value. Accordingly, we affirm. *See* 8th Cir. Rule 47B.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 8:00CV279

[Filed August 30, 2001]

Ronald Bradley,	)
Plaintiff,	)
	)
v.	)
	)
Monarch Construction, Inc.	)
Defendant.	)
	)

MEMORANDUM AND ORDER

Before the court is the oral motion for judgment as a matter of law made by the defendant, Monarch Construction, Inc. ("Monarch"), pursuant to Fed. R. Civ. P. 50(a) after the Close of the plaintiff's case and again at the close of all the evidence during the trial of this action. For the reasons set forth below, the court finds and concludes that the defendant's oral motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a)(1) and (2)shall be, and hereby is, granted.[1]

[1] The court took under advisement the defendant's motion made at the close of the plaintiff's case. The defendant then renewed the motion at the close of all the evidence, and the court

The plaintiff, Ronald Bradley, alleges claims of disability discrimination under the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 (the "ADA") and the Nebraska Fair Employment Practice Act ("NFEPA"), Neb. Rev. Stat. §§ 48-1111 *et seq.* Monarch is Bradley's former employer. Monarch bases its motion for judgment as a matter of law on 42 U.S.C § 12111(5) and the corresponding provision of NFEPA, Neb. Rev. Stat. § 48-1102(2), which define "employer" and, therefore, which establish the threshold issue Whether a particular employer is subject to the ADA and NFEPA.

The court notes a split in the United States Courts of Appeal regarding whether the issue raised in Monarch's motion is to be considered "jurisdictional." Compare, e.g., *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677-78 (7th Cir. 1998) (the question whether a particular defendant is an "employer" who is covered by civil rights laws such as the ADA is not jurisdictional), *abrogated on other grounds by Papa v. Katy Industries., Inc.*, 166 F.3d 937, 939-40 (7th Cir. 1999), with *Jones v. American Postal Workers Union, National*, 192 F.3d 417, 423 (4th Cir. 1999) (district court lacks subject matter jurisdiction when the defendant is not a "covered entity" under the ADA).

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at this time sustains the defendant's motion pursuant to Fed. R. Civ. P. 50(a)(1) and (2).

JUDGMENT AS A MATTER OF LAW ("JMAL")

Fed. R. Civ. P. 50(a)(1) states" "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." A court ruling on a motion for JAML may not resolve factual disputes or make credibility determinations and must view all evidence in the light most favorable to the nonmoving party. *Clark v. Long*, 255 F.3d 555, 557 (8th Cir. 2001). *Accord Phillips v. Collings*, 256 F.3d 843, 847 (8th Cir. 2001) (In making this [JMAL] determination, the court must draw all reasonable inferences in favor of the nonmoving party without making credibility assessments or weighing the evidence."). See also *Kinserlow v. CMI Corporation*, 217 F.3d 1021, 1025 (8th Cir. 2000):

> In both Rule 56 motions for summary judgment and motions for judgment as a matter of law, the inquiry is the same" "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,251-52... (1986). Rule 50(a) allows the judge in a jury trial to enter judgment against a party with respect to a claim or defense; "that cannot under the

> controlling law be maintained or defeated without a favorable finding on that issue," when the party has been fully heard on the issue and "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on the issue." Fed. R. Civ. P. 50(a).

However, "[i]n a motion for judgment as a matter of law, the nonmoving party is only entitled to the benefit of reasonable inferences.... A 'reasonable inference is one "which may be drawn from the evidence without resort to speculation. When the record contains no proof beyond speculation to support the verdict, judgment as a matter of law is appropriate."'" *Id.* at 1026.

"EMPLOYER" UNDER THE ADA

42 U.S.C § 12111(5) defines "employer" as follows: "The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." (Emphasis added.) 42 U.S.C § 12111(4) defines "employee," in pertinent part, as "an individual employed by an employer..." Monarch contends that it lacks the requisite number of employees to qualify as an "employer" under the ADA or NFEPA.

Monarch terminated Bradley's employment in November 1998. Therefore, calendar years 1997 and 1998 constitute the relevant period for determining the number of

Monarch's employees. During his testimony, Bradley listed persons whom he believed Monarch employed during the relevant period. However, in *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S.Ct. 660 (1997), the Supreme Court established specific criteria for ascertaining whether an employer is a covered "employer" under the civil rights laws. Therefore, the issue is whether Bradley presented sufficient evidence on which a reasonable jury could find that Monarch met the criteria defined in *Walters*.

For purposes of ascertaining whether an employer has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, "the ultimate touchstone ... is whether an employer has **employment relationships** with 15 or more individuals for each working day in 20 or more weeks during the year in question." *Id.* at 666 (emphasis added). To determine the existence of an employment relationship, the court looks first to whether an ailegedly employed individual appears on the employer's payroll during the relevant period. *Id.*

For temporary and part-time workers, just as with salaried employees, the issue is not whether such individuals actually appeared at the work site on a given day. "[O]n any particular day, all of the individuals with whom an employer has an employment relationship are 'employees' of that employer...Thus, individuals who are not receiving compensation from their employer on the day in question nonetheless qualify as 'employees' " *id.* at 663. "This test is generally called the 'payroll method,' since the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *Id.* Of course, the

statutory definition includes only persons who have an employment relationship with the defendant "each working day in each of 20 or more calendar weeks."

However, the necessary inquiry extends beyond the appearance of a name in the employer's payroll records. "**An individual who appears on the payroll but is not an 'employee' under traditional principles of agency law, would not count toward the 15-employee minimum.**" *Id.* at 666 (emphasis added). Consequently, an individual's appearance on the employer's payroll records is not necessarily dispositive and will not cause an independent contractor to count as an employee merely because the payroll records indicate compensation to that individual. *Id.*

Bradley maintains that for liability under the ADA and other civil rights laws, otherwise separate entities may be regarded as a single employer if certain facts and circumstances are present. *See generally Artis v. Francis Howell North Band Booster Ass'n., Inc.*, 161 F.3d 1178, 1184 (8th Cir. 1998) ("Separate entities can be consolidated to meet the ... employee numerosity requirement based on the following factors: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.'"). *See also Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391-392 (8th Cir. 1977), explaining that the courts, in determining whether separate entities are sufficiently integrated to be considered a single, or joint, "employer" have turned for guidance to a test promulgated by the National Labor Relations Board. The factors to be considered in that test are the factors stated and adopted by the Eighth Circuit in *Artis*: (1) interrelation of

operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

In this case, Bradley includes in the calculation of the defendant's employees certain persons Monarch uses as commissioned sales agents and a manager for Monarch Homes Real Estate, Inc. and Monarch Storage, LLC. respectively. But *see contra Artis v. Francis Howell North Band Booster Ass'n. Inc.*, 161 F.3d at 1184 (separate payroll systems, no interrelated funding, insufficient centralized control of labor relations to establish joint employer); *Massey v. Emergency Assistance, Inc.*, 724 F.2d 690 (8th Cir.), *cert. denied,* 105 S.Ct. 323 (1984) (city and private non-profit corporation providing emergency services to city residents were not sufficiently interrelated to be considered joint employer or principal and agent); *Webb v. American Red Cross*, 652 F. Supp. 917, 919-921 (D. Neb. 1986) (national and local chapters of the American Red Cross were too distinct to be considered a joint employer).

Bradley has not presented evidence on which a reasonable finder of fact could find that the defendant and the other Monarch companies, i.e., Monarch Homes Real Estate, Inc. and Monarch Storage, LLC., have the kind of interrelated operations which would cause them to be considered a joint employer. In addition, even if the three entities were to be considered a joint employer, Monarch presented uncontradicted evidence that the persons who work for Monarch Storage, LLC. and Monarch Homes Real Estate, Inc. are independent contractors and not employees.

Finally, Monarch's payroll records, Wage and Tax Statements, Combined Tax Reports and check register (Exs. 201-204) do not indicate whether there were any 20 weeks during the relevant period in which Monarch had 15 or more employees. The quarterly reports, for example, include every person who performed work of any kind for the defendant, if even for one day, and do not create a submissible issue of fact on the threshold questions (1) whether the numerosity requirement was satisfied in each of 20 or more calendar weeks and (2) whether the individuals who were paid by Monarch during the relevant period were "employees" under traditional principles of agency law. *See Walters*.

The court concludes as a matter of law that the plaintiff has failed to present sufficient evidence on which either the court or the jury could reasonably find, without pure speculation, that the defendant had the requisite number of employees to qualify as an "employer" under the ADA and NFEPA.

THEREFORE, IT IS ORDERED:

(1) That the defendants' oral motion for judgment as a matter of law, made pursuant to Fed. R. Civ. P. 50(a), is granted;

(2) That a separate Judgment will be entered on this date in accordance with this Memorandum and Order.

DATED this 30th day of August, 2001

BY THE COURT:

/s/ _____
ROBERT W. PRATT
United States District Judge

APPENDIX C

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

Certified Mail #
To:

Ronald Bradley
1004 East Aberdeen Dr.
Papillion, NE 68046

From:

Equal Employment Opportunity Commission
Denver District Office
303 E. 17th Avenue, Suite 510
Denver, Colorado 80203-9634

Charge No. 32E990882

EEOC Representative Ronald Houser, State and Local Coordinator

Telephone No. (303) 866-1340

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

[X] The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

NOTICE OF SUIT RIGHTS

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. If you decide to sue, you muse sue **WITHIN 90 DAYS** from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more that 2 years (3years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office.)

On behalf of the Commission

/s/ _____
Francisco J. Flores, Jr.
District Director

2/17/00
(Date mailed)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3319

[Filed June 26, 2002]

Ronald Bradley,	)
Appellant,	)
	)
v.	)
	)
Monarch Construction, Inc.	)
Appellee.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

June 26, 2002

Order Entered at the Direction of the Court:

/s/ _____
Clerk, U.S. Court of Appeals,
Eighth Circuit

Supreme Court U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

No. 02-481

In The

Supreme Court of the United States

RONALD BRADLEY,

Petitioner,

v.

MONARCH CONSTRUCTION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Petitioner, Ronald Bradley, has filed a Petition for Writ of Certiorari to the United States Supreme Court. He seeks an order vacating the action of the United States Court of Appeals for the Eighth Circuit affirming the grant of judgment as a matter of law issued and filed on August 30, 2001 by the United States District Court for the District of Nebraska, the Honorable Robert Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

The civil action commenced by Petitioner in the District Court sought damages for an alleged violation of the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA") and the Nebraska Fair Employment Practices Act, § 48-1111 et seq. of the Revised Statutes of Nebraska ("NFEPA").

After a trial before a jury, the District Court granted a motion for judgment as a matter of law pursuant to Federal Rules of Civil Procedure 50(a). That ruling was based upon the determination of the District Court that Petitioner had failed to meet his burden of proof that Respondent was an "employer" within the definition contained in the ADA and NFEPA.

Supreme Court Rule 10 provides guidance as to the matters considered in ruling upon a petition for certiorari. Certiorari is not a matter of right and will be granted by the Supreme Court only for compelling reasons. None of the reasons given as examples in Supreme Court Rule 10 are applicable in this case. There is not a conflict in decisions between the United States Courts of Appeals, nor is there a conflict in decisions between the Nebraska Supreme Court or a United States Court of Appeals on this

issue. This civil action does not involve an important question of federal law that has either not been decided by the Supreme Court or has been decided in conflict with prior decisions of the Supreme Court. The question of law at issue, i.e., the manner in which it is ascertained whether an employer is a covered "employer" under the Civil Rights laws, has been decided by the Supreme Court in *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S.Ct. 660 (1997) and was properly applied by both the District Court and Court of Appeals in this civil action.

A reading of the District Court opinion and order shows that the District Court found that:

a) to be an employer and subject to the requirements of the ADA and NFEPA, it was necessary that Petitioner prove that Respondent was an "employer" in that it had 15 or more "employees" for each working day in 20 or more weeks in the current or preceding calendar year;

b) the evidence submitted by Petitioner at trial did not indicate whether the numerosity requirement was met in each of the twenty weeks or more in the current or preceding calendar year or whether the individuals who were reflected on the payroll records were "employees" under traditional principles of agency law. (See *Walters, supra*);

c) there was no evidence presented by Petitioner on which a reasonable fact finder could find without pure speculation that Respondent had the requisite number of employees, or that the other purported related companies have the kind of interrelated

operations such that they could be considered a single employer; and

d) that, even if the companies were interrelated, Respondent presented uncontradicted evidence that persons who perform work for these entities are independent contractors and not employees.

Petitioner argues in his Petition for Writ of Certiorari that the District Court made errors with regard to factual determinations – not as to controlling law. The District Court correctly applied the controlling law of *Walters*, that "traditional principals of agency law" govern the numerosity of employees issue. The District Court found that, in applying this test, Petitioner had wholly failed to meet his evidentiary burden.

It is clear that Petitioner had the burden of proving that there were the requisite number of employees on each day of the required twenty weeks, that Petitioner failed to meet that evidentiary burden, and that the District Court acted correctly in entering judgment as a matter of law and the United States Court of Appeals for the Eighth Circuit acted properly in affirming that action, both in proceedings before the three-judge panel and *en banc*. As Supreme Court Rule 10 specifically states, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."

This case is clearly not worthy of review on Certiorari under the requirements of Supreme Court Rule 10.

Respectfully submitted,

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